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CASE NO. 213

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

BRACK HOWARD NOBLE and ANN C. NOBLE,
Petitioners,

vs.

HATTIE DE VAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

N. J. COTRO-MANES and
PAUL N. COTRO-MANES
Counsel for Petitioners

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioners, Brack Howard Noble and Ann C. Noble, respectfully pray that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Utah in its Case No. 9478.

OPINION

The opinion to be reviewed is in Utah Supreme Court Case No. 9478 set forth fully in the Appendix hereto (Page 9) and is reported in ..... U.2d ....., 369 P.2d 290.

JURISDICTION

This court has jurisdiction to hear and determine the issues and such jurisdiction is evoked under the provisions of 28 U.S.C.A. Par. 1257 (3), authorizing review by writ

of certiorari of a decree rendered by the Utah Supreme Court (its highest State court) where such a decision is repugnant to the Constitution of the United States and the Constitution of the State of Utah. The decision of the Utah Supreme Court was rendered February 27, 1962, and the Petition for Rehearing was denied April 3, 1962.

The federal issue here presented was first raised in the Petition for Rehearing by the applicants before that court.

QUESTIONS PRESENTED

(a) Can the Supreme Court of the State of Utah hold that admissions contained in the pleadings are not conclusive against the pleader without violating petitioners' constitutional rights under the 14th Amendment?

(b) Can the Supreme Court of Utah hold that a plaintiff was not bound by her admissions or pleadings without doing violence to the fundamental law of the land?

(c) Can the Supeme Court of Utah deny applicants the right to rely upon plaintiff's pleadings without violating their fundamental constitutional rights under the 14th Amendment and Article 1, Section 7, of the Constitution of Utah?

(d) Can the Supreme Court of the State of Utah ignore precedent by failing to overrule, modify, alter or otherwise recognize the existing principle of Stare Decisis without violating the equal protection of the law and due process of law clause of the 14th Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the due process clause of the 14th Amendment to the Constitution of the United States; Article I, Section 7 of the Constitution of Utah; and the following Utah statute found in the Utah Code Annotated 1953: 78-12-26.

PRELIMINARY STATEMENT

In this action the plaintiff, Hattie DeVas, sought to invalidate two warranty deeds, by which deeds certain uncultivated lands were conveyed by the plaintiff to the defendants on the 23rd day of September, 1952, and the 12th day of March, 1953, respectively.

The action was commenced by the filing of a complaint on the 10th day of November, 1958, or more than five years after the execution of the last deed. On December 5, 1958, motion to dismiss was filed by the defendants, and the District Court on the 16th day of December, 1958, granted the motion; allowing, however, plaintiff ten days within which to file an amended complaint. A second amended complaint was filed and a motion for judgment on the pleadings was filed by the defendants on the 2nd day of April, 1959, and thereafter the court granted the motion allowing the plaintiff seven days from date to amend her complaint. On the 22nd day of April, 1959, a third amended complaint was filed by the plaintiff and for the first time plaintiff raised the question of the forgery of one of the deeds.

The case was tried on the third amended complaint and the answer of the defendants. Judgment was entered in favor of the plaintiff and against the defendants by the District Court in and for Davis County, State of Utah; and the case was appealed to the Supreme Court of the State of Utah, which rendered its decision affirming the judgment.

Paagraph 3 of the third amended complaint set forth inter alia that "Between October, 1952, and the 20th day of March, 1953, plaintiff made repeated efforts to induce defendant, Brack Howard Noble, to reconvey to her the property described in paragraph 3 thereof."

Plaintiff admitted in her answers to interrogatories sworn to by her "that she knew that she was defrauded of her lands some time in October, 1952".

BRIEF IN SUPPORT OF PETITION

POINT I

THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO HEAR THIS MATTER ON THE GROUNDS AND FOR THE REASON THAT THE APPLICANTS HAVE BEEN DENIED DUE PROCESS OF LAW AS PROVIDED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Since the adoption of the 14th Amendment to the Constitution of the United States, it is a recognized principle that a litigant may, by Writ of Certiorari, invoke the jurisdiction of the United States Supreme Court where it can be shown that his rights under the 14th Amendment have been violated. *Stein v. New York*, 346 U.S. 156, 97 L. ed. 1522, 73 S. Ct. 1077; *National Union et al. v. Arnold*, 348 U. S. 37, 99 L. ed. 46, 75 S. Ct. 92; *American Railway Express Co. v. Kentucky*, 273 U. S. 269, 71 L. ed 639, 47 S. Ct. 353.

The Supreme Court of Utah, in its opinion, has held that the general rules of evidence that a party is bound by his testimony is not applicable in the instant case as there are factors of age, mental ability and psychiatric nature which make them of questionable nature. With this the defendants cannot agree (*Toone v. J. P. O'Niel Constr. Co.*, 40 U. 265, 121 P. 10) but recognize that the Supreme Court of the United States has held that judicial error is not grounds for invoking the jurisdiction of that court. However, the complete ignoring of the answers to interrogatories, prepared by plaintiff's own attorney, and the complete ignoring of plaintiff's complaint wherein she admits to knowledge of fraud which started the running of the statute of limitations, are in direct contravention of the fundamental established law and practice and procedure of Utah law. This breach has deprived the defendants of their rights to due process of law under the 14th Amendment.

The long standing fundamental doctrine of procedure in Utah, as in virtually all other jurisdictions, is that a

party is bound by his pleadings and the admissions made therein.

> "Admissions contained in a pleading are conclusive as against the pleader and are proof of facts which they admit and render evidence thereon unnecessary."
>
> *Anderson v. Salt Lake City,* 79 U. 324, 10 P.2d 927.

> "It is a familiar doctrine that pleadings in a pending cause are more than admissions; that until changed they are conclusive on the parties pleading them and cannot be controverted by the pleader either in the trial court or on appeal." (Citing Utah cases.)
>
> *Wasatch Livestock Loan Co. v. Lewis & Sharp,* 84 U. 347, 35 P.2d 835.

See also to the same effect 1 Bankroft's Code Pleading, P. 626, Sec. 429; 71 C.J.S. 149, Pleadings, Sec. 59.

Under the Utah Rules of Civil Procedure, Rule 11, (Substantially the same as Rule 11, Federal Rules of Civil Procedure), the above rule of law is not changed by the fact that the complaint has not been verified. *Calder v. Third Judicial Court,* 2 U.2d 309, 273 P.2d, 168, 46 ALR 2d 887. The Supreme Court of Utah completely failed and refused to note or follow this fundamental procedural rule that a party is bound by his pleadings. By this the jurisdiction of the Supreme Court of the United States may be invoked as the defendants have been deprived of their property without due process of law.

> "Within the meaning of that amendment (14th Amendment) a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power inconsistent with 'those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political

condition by having been acted on by them after settlement of this country'."

Tracy v. Ginzberg, 205 U.S. 170, 51 L.ed 755, 27 S. Ct. 461.

"We cannot interfere unless the judgment amounts to mere arbitrary or capricous exercise of power or is in clear conflict with those fundamental principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." (Citing cases).

American Railway Express Co. v. Kentucky, 273 U.S. 269, 71 L.ed 639, 47 S. Ct. 353.

POINT II

THE APPLICANTS HAVE BEEN DENIED EQUAL PROTECTION OF THE LAW BY THE SUPREME COURT OF UTAH IN ITS DECISION WHEREIN IT WAS HELD THAT THE PLAINTIFF WAS NOT BOUND BY HER ADMISSIONS OR PLEADINGS.

The settled law of the United States and of Utah is that the complaint is the fundamental basis upon which any law suit is based. The long standing settled law in Utah is that the pleader is bound by his pleadings (see point I above). As the settled law has been in the past and is now that the plaintiff is bound by his complaint, it is submitted that these defendants have been treated differently than all those comparably situated and that as such have been denied equal protection of the laws. *National Union et al. v. Arnold*, 348 U.S. 37, 99 L. ed 46, 75 S. Ct. 92.

POINT III

THE APPLICANTS HAVE BEEN DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW BY THE SUPREME COURT OF UTAH IN ITS DECISION BY ITS FAILURE TO ADHERE TO EXISTING PRECEDENT OR CREATE NEW PRECEDENT.

The question of the right of a State Court to alter, overrule or amend previous decisions and matters settled under the doctrine of Stare Decisis, has been passed upon by the

Supreme Court on various occasions in the past, and it is recognized that as a general proposition of law, a State Court can overrule previous law and make new law without a violation of the Due Process, Equal Protection or the Imparement of Contract clause of the Constitution. *Fidelity & Columbia Trust Co. et al. v. City of Louisville*, 245 U.S. 54, 62 L.ed. 145, 38 S. Ct. 40.

However, it is submitted that where a state court fails to follow an accepted principle of law recognized in that particular jurisdiction and further fails to overrule, modify, alter or otherwise recognize the existing principle or fails to create new precedent, then there is a violation of equal protection of the law and due process of law as provided by the 14th Amendment.

It is submitted that this is the clear implication of *A. Bacus Jr. & Sons v. Fort Street Union Depot Co.*, 169 U.S. 557, 42 L.ed. 853, 18 S. Ct. 445, wherein the Court ruled that overruling of past methods of procedure is not a violation of fundamental rights when *new procedure* is substituted. However, where procedure adopted has created contractual rights, these rights cannot be divested by judicial change. *Muhlker v. N.Y. & H.R. Co.*, 197 U.S. 544, 49 L.ed. 872, 25 S. Ct. 522.

In the instant case now before the court, the Supreme Court of Utah failed to follow old precedent or make new precedent in the following particulars:

1. Failed to follow the old law or make new precedent with regard to admissions in pleadings.

2. Failed to follow the old law or make new precedent with regard to admissions in interrogatories.

3. Failed to follow the old law or make new precedent with regard to setting aside a deed where there has been failure of consideration to support the deed.

With respect to one and two above, refer to Points One and Two cited herein.

With respect to Point Three above, see *Desert Centers, Inc. v. Glen Canyon, Inc.*, 11 U. 2d 166, 356 P.2d 286.

WHEREFORE petitioners respectfully submit that this is a matter of national importance affecting fundamental rights and procedures in Utah and throughout the nation. You are respectfully requested to accept the enclosed petition for a writ of certiorari, consider the same and grant such writ of certiorari so that a full and complete review of the issues may be considered from a constitutional viewpoint.

BRACK HOWARD NOBLE
and ANN C. NOBLE

By .....
N. J. Cotro-Manes

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

CASE NO. 9478

HATTIE DE VAS, *Plaintiff and Respondent,*

vs.

BRACK HOWARD NOBLE and ANN C. NOBLE,

Defendants and Appellants.

CROCKETT, *Justice:*

Defendants Mr. and Mrs. Brack H. Noble appeal from a judgment nulifying two deeds to real property obtained from the plaintiff: one on the ground of fraud; and the other for forgery; and also from an award of damages.

The trial court having found for the plaintiff, it is both our prerogative and duty to review the evidence and every inference that may be fairly and reasonably drawn therefrom in the light most favorable to the plaintiff, which we do in our treatment of the facts.[1]

Plaintiff Hattie DeVas is an elderly lady of the type sometimes referred to as a "character": She has lived for many years as a recluse in a make-shift dwelling on the property in question in the brush-covered hills east of Farmington, Utah. Her unique home and manner of living, which we will again refer to below, are quite detached from civilization and its ways, and unspoiled by such modern trappings as running water or electricity or the contrivances attendant therewith. The suspicions of limitations upon her cerebral equipment were such that before she was permitted to testify the trial judge, with the agreement

1. *Fleming v. Fleming Felt Co.*, 7 Utah 2d 293, 323 P.2d 712.

of counsel, directed that she be given a psychiatric examination. The report indicated that she could testify but the examiner had reservations as to the confidence to be reposed in her testimony and that it should be received with caution.

Essential facts surrounding the procurement of the deeds referred to are these: Hattie DeVas owned about 30 acres of land up in the foothills. It had been of little value until the urban incursion during and following World War II, which burgeoned the population of Davis County. In September of 1952, defendant Brack H. Noble talked to her about the possibility of purchasing some of her land and also discussed some other matters, including the desirability of a survey; and that running water should be brought to the plaintiff's place. Mr. Noble in fact got Mr. Robert G. Harding to survey part of the plaintiff's land. On September 23, 1952, the plaintiff signed a warranty deed to Mr. Noble of about 30 acres of the land. The document was signed in the office of attorney Wendel B. Hammond at Bountiful, who acknowledged the plaintiff's signature as notary. The plaintiff's version of this transaction is that she signed a paper so there could be a survey of the land. And while she admits that there had been an oral agreement to sell some of her land to Mr. Noble she claims no conveyance was to take place until she was informed of the number of acres the survey revealed she owned and a price per acre had been agreed upon between herself and Mr. Noble. She further maintains that she was never given the results of the survey; that no amount was ever agreed upon or paid for the property; and that she was thus induced by deception into signing the document, believing that the paper she signed was only to cause a survey to be made of her lands. A second deed, found to be a forgery, purported to convey to the Nobles about seven acres of her land.

The position of the plaintiff is that the defendants practiced a continuing fraud and deception upon her up to the spring of 1958, perodically promising to do right by her concerning her land but failing to do so. Defendants

dispute these charges. They admit that no major monetary consideration was given for the land, but they assert that the following things constituted consideration for it: that the $10.00 nominal consideration recited in the first deed was in fact paid; that the Nobles were to cause the land to be surveyed; that they were to file on and develop a spring and pipe water to the plaintiff's property; and that they were to give the plaintiff a number of curios and antiques, all of which they claim was done. In view of the fact that upon disputed evidence the trial court found that the defendants gave no consideration for the property, that finding is sustained.

The issue of gravest concern is defendants' contention that the statute of limitations had run before plaintiff commenced her action. Sec. 78-12-26(3) requires that an action for fraud be brought within three years. But it also expressly states that: ". . . the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." The statute is an affirmative defense. Therefore, it must be expressly pleaded and proved.[2] Accordingly, once the fact of fraud in inducing the signing of the deed was established, as was here found by the trial court, it then became the responsibility of the defendants to show that Hattie DeVas was aware that she had been cheated out of her property more than three years before she instituted her action. The trial court refused to so believe and find, but found to the contrary: that the deception continued until shortly prior to the filing of the action.

Defendants insist that the evidence is such that it requires that finding to be overturned and found the other way as a matter of law. It must be conceded that statements were elicited from Mrs. DeVas which normally should be regarded as showing that she knew she had been cheated out of her property shortly after the original conveyance. But there are unusual factors present here, which we dis-

2. *Clawson v. Boston Acme Mines Dev. Co.*, 72 U. 137, 147, 269 P. 147, 59 A.L.R. 1318.

cuss below, which must be taken into account in determining whether the trial court must be overruled in refusing to find in accordance with the defendants' contention.

In addressing the question whether the trial judge was obliged to make the finding demanded by the defendants, it is well to keep in mind certain principles applicable where it is required that a fact be found affirmatively and the court refuses to do so. In order to compel such a finding it is necessary that the evidence concerning the fact in question not only be of sufficient quality and substance to support a finding that it is true, but it must go beyond that and be such that all reasonable minds would so conclude. On the other hand, if there is any reasonable basis in the evidence, or lack of evidence, from which reasonable minds could honestly say they were not convinced of such facts by preponderance of the evidence, then the ruling of the trial court should be sustained.[3]

Due to his function as the determiner of the facts and his advantaged position in close proximity to the witnesses and the trial, it is his privilege to be the exclusive judge of the crediblity of the witnesses, the weight to be given the evidence and the facts to be found therefrom. This includes appraisal of the ability of the witnesses to know and understand and their capacity to remember. The Court's prerogative of course does not go so far as to permit him to stubbornly ignore and refuse to be guided by credible, uncontradicted evidence when all reasonable minds would accept it. That could result in arbitrary and unreasoning denial or distortion of justice. Nevertheless because of the prerogative just mentioned as judge of all aspects of the case, if the testimony of a witness is affected with any frailty which might reasonably be considered as casting suspicion upon it or discrediting its accuracy or truthfulness, the court is not bound to accept such testimony as the fact and so find. And the rule is not otherwise because the witness happened to be a party to the action.

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3. See statement in *Stickle v. U. P. RR. Co.*, 122 Utah 477, 251 P.2d 867; also in *Page v. Federal Security Ins.*, 8 Utah 2 226, 332 P.2d 666.

Consistent with the observations just made, in appraising the testimony of plaintiff Hattie DeVas the trial judge was entitled to consider all of the facts and circumstances which shed light on its reliability. She was 78 years of age; was hard of hearing; appeared to be very impulsive; was easily irritated; and was antagonistic toward opposing counsel. The judge manifest commendable eagerness to get to the foundations of the facts and to the justice of this cause. In addition to the psychiatric examination of the plaintiff, and the examination during the trial, he visited her place and made some helpful observations about what he saw. From his description it seems an understatement to say merely that she is an eccentric personality. Her place may be described as a hodge-podge of a large variety of incongruities: animal, vegetable and mineral. The nondescript agglomeration of miscellany was appropriately complemented by a pungent assault on the olfactory sensibilities, emanating from guinea hens, turkeys, chickens, goats, sheep and dogs.

Mrs. DeVas seems to be quite in character with the surroundings. The trial judge referred to her as being in a "demented condition" and made some revealing comments as to his judgment of her mental capacity and the degree of confidence that could be placed in her testimony:

> "Hattie has some degree of competency, but her line between that and the committable personality is narrow."
>
> • • •
>
> "She obviously denies signing documents, which could not possibly be an intentional lie, but obviously is a lie."
>
> • • •
>
> "I find that her ability to recall events and explain it are now gone."
>
> • • •
>
> ". . . That it would be a fiction and an injustice to charge Hattie with knowing the things that a normal person would know."

• • •

> "I would strongly suggest to Mr. Bean [plaintiff's counsel] . . . that he take steps to have some type of guardanship established over her to prevent this type of thing."

It is appropriate to note that the trial judge also forthrightly stated his conclusion as to the conduct of Mr. Noble in knowing and taking advantage of her deficiencies. He stated:

> "that Mr. Noble has in fact relied upon her ineptness, knowing that she would not make such deductions as a reasonable person, and has deliberately misled her and prevented her bringing her action at an earlier time and should be estopped to claim the statute of in this matter."

Having a significant bearing on the above point is the testimony of Mr. Gene Wheadon who testified that in a conversation with Mr. Noble, in response to questions as to how he had gotten Hattie's land, Mr. Noble said that he had "tricked" her out of it; and that Mr. Noble also stated that if nothing was done about it for seven years, "then it was outlawed."

The judge similarly gave his opinion as to the quality and reliability of the testimony of the defendant Noble:

> ". . . Mr. Noble's account of things is obviously false."

Notwithstanding our recognition of the rule that ordinarily a person will be bound by his own testimony against his interests, that rule cannot be invoked under the circumstances here, where the trial court, supported by ample justification in the record, has concluded that the party has such mental limitations that her testimony is unreliable. It must be remembered that the rules of construction and interpretation of evidence are purposed to aid in ascertaining the truth and administering justice and that they should not be distorted by unreasoning rigidity into obstacles to the accomplishment of that objective.

Under the circumstances it would be a travesty upon justice to accede to the defendants demand that the trial court be compelled to believe and make findings in accordance with erratic statements she may have made that would result in this court's lending its assistance to and compounding the trickery and deceit which the trial court found the defendants have indulged in to cheat the plaintiff out of her property without paying for it. *This we will not deign to do. It is our conclusion that there is substantial basis in the record to justify the trial court's refusal to find that the plaintiff knew she had been cheated out of her property for more than three years prior to the commencement of her action.*

In attacking the finding of forgery of the second deed as unsupported by competent evidence, the defendants make one point which we think worthy of comment: that the testimony of the handwriting expert, Mr. Percy Goddard, was not credible nor competent because it was grounded upon comparison of the signature on the deed with exemplars improperly admitted in evidence. They urge that where an examplar signature is given after the controversy has arisen, and for the sole purpose of such comparison, testimony based upon it is not admissible, citing *Chemical Corn Exchange Bank & Trust v. Frankel, et al.*,[4] and the annotation thereto at 72 A. L. R. 2 1270 et seq. We acknowledge the merit of such a rule under some circumstances because of the possibility of simulation or deception. But the text relied upon by the defendants makes what we regard as a sound statement at page 1276:

> ". . . Most of the courts which have considered the question have taken the position that the competency as a standard of comparison to establish the genuineness of handwriting, of writings made after the controversy arose *depends upon the circumstances under which such offered writings were made.*" (Emphasis added.)

4. (Fla.) 111 So 2d 99, 72 A.L.R. 2d 1270.

The expert witness here, Mr. J. Percy Goddard, appears to be a man of unquestioned integrity, competence and experience in this field. Plaintiff was requested to make a large number of exemplars of her signature (35 were made) just prior to the trial to be used as a standard of comparison with the signature on the questioned deed. There is usually safety in numbers and it is reasonable to assume that the expert requested this large number in order that the true characteristics of her writing could be seen and that any attempt at deception would be minimized. Any weakness that may have existed in the testimony on the basis of the objection made as to the exemplars went to its weight rather than to its admissibility. It was within the sound discretion of the trial court to judge the competency of the testimony proferred and we see no abuse thereof in receiving it.

Yet to consider is the question of damages. The award of $200.00 damages is the amount Mr. Noble had received for the granting of an easement on the property to the Weber Basin Water District and is sound. As to the attack on the $750 awarded as punitive damages: In view of the belief and the findings of the trial court that the defendants had perpetrated an egregious fraud upon this hapless plaintiff, the elements requisite to the imposition of punitive damages are present. The amount awarded is not so disproportionate to the wrong done, nor to the amount of the plaintiff's recovery, that we could say that the court abused the latitude of discretion allowed it in setting such damages.[5]

Affirmed. Costs to plaintiff (respondent).

WE CONCUR:

LESTER A. WADE, *Chief Justice*

ROGER I. McDONOUGH, *Justice*

E. R. CALLISTER, JR., *Justice*

5. See 15 Am Jur. Damages, Sec. 274; *Evans v. Garsford*, 122 Utah 156, 247 P. 2d 431.

HENRIOD, *Justice*: (Dissenting)

I am constrained to dissent. The facts reported in the main opinion slant more favorably in the direction of the plaintiff's contention, as they should do in this case. Whether this justifies a conclusion that her theory of fraud is pointed up by clear and convincing evidence is another matter, one which may be debatable in any given set of circumstances. There may be opposition evidence that may be so unworthy of belief as almost to be discountable in toto. Aside from that however, it is my opinion that taking as undenied the facts recited in the main opinion itself, they do not seem to be so clear and convincing as to vitiate the solemnity of a sealed, recorded instrument, unattacked on any equitable basis for about seven years.

It seems to me that the testimony of this lady of 76 years, given seven years after the subject deeds came into existence, in a self-serving atmosphere emphasized by a seven-year progressive psychiatric difficulty, high-lighted by a pass at the deffendant with one of Brigham Young's antique brooms, does not lend itself to any substantial degree of clarity or convincement, justifying avoidance of the documents. It seems that the trial court concluded as it did, not so much because of proven practiced fraud, but because of the differential in intelligence and business acumen of the parties, coupled with a considerable land value appreciation from time of deeds to trial. I believe I reasonably could have arrived at the result here, had plaintiff's theory been one of "no contract" by virtue of incompetency to contract and carry on ordinary business affairs by one of the parties. In such event it would be a case of invalidity since the inception, not one of a contract made, but voidable on some equitable grounds.

The trial court appears to have based his conclusion, at least in part, on the mental deficiency of plaintiff *at the time of the trial,* not seven years before, during which period certain degenerative processes may have produced a change that may not have been reflected seven years before.

In connection with this time lapse, and in harmony with the authorities cited by defendant as to the inadmissibility

of handwriting exemplars furnished *after* trial begun,[1] not before, where the trustworthiness of their genuineness would be eminently of more probative value. I believe their introduction erroneous to show forgery, not only because of their questionable probative value, but because a seven year period of time in the lives of persons in the same age group as plaintiff oftentimes shows a more rapid decadence in handwriting ability and similarity than it does mental degeneration.

I am unprepared to say that, assuming a 100% verity of the facts related in the main opinion, there is that quantum and quality of proof that may be said to prove clearly and convincingly that a seven-year-old, recorded instrument, acknowledged in a reputable attorney's office, should be avoidable on the grounds of fraud, particularly when such facts are adduced by a person of this lady's age whose mentality *at the time of the trial*, not before, was doubtful even in the contemplation of the trial court.

1. 72 A.L.R. 2d 1277: "Thus, in most of such cases it has been held or recognized that a signature or specimen writing made after the controversy arose and for the purpose of being used as a standard of comparison with the disputed writing cannot be used as an exemplar on behalf of the person making it."